STATE OF MICHIGAN

IN THE SUPREME COURT

BEVERLY HEIKKILA, as Personal Representative of the ESTATE OF SHERI L. WILLIAMS,

Plaintiff-Appellant,

v

NORTH STAR TRUCKING, INC.,

Defendant,

and

MARC ROLLAND SEVIGNY and J. R. PHILLIPS TRUCKING, LTD.,

Defendants-Appellees,

and

NORTH STAR STEEL CO.,

Defendant/Cross-Plaintiff-Appellee,

v

INTERNATIONAL MILL SERVICE, INC.,

Defendant/Cross-Defendant-Appellee.

UNPUBLISHED
December 7, 2004

No. 246761
Monroe Circuit Court
LC No. 00-011135-NI

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NORTH STAR STEEL'S APPLICATION FOR LEAVE TO APPEAL

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ORDER APPEALED FROM AND RELIEF REQUESTED

In an opinion dated November 20, 2002, the Monroe County Circuit Court granted North Star Steel's motion for summary disposition and dismissed plaintiff's complaint. The opinion concluded that there was inadequate "evidence for a reasonable trier of fact to conclude Defendants proximately caused Plaintiff's injury." The trial court also concluded that the trucking company and driver "owed Plaintiff no legal duty to again inspect their truck tires. . . ." Finally, the Monroe County Circuit Court found that plaintiff's experts Bereza, Crane and Bosscher, lacked "specialized, scientific knowledge" to remove their testimony "from the ambit of speculation" and, therefore, barred their testimony.

On appeal by plaintiff, a divided Court of Appeals panel, in three separate opinions:

> **Reversed** the lower court, finding that "plaintiff has presented sufficient evidence to indicate a "reasonable likelihood of probability" that defendants' actions served as the proximate cause of plaintiff's decedent's death. (Judges Smolenski and White; Judge Kelly dissenting.)
>
> **Reversed** the lower court, finding that plaintiff created a genuine issue of fact on the issue of the truckers' duty. (Judges Smolenski and White; Judge Kelly dissenting.)
>
> **Affirmed** the lower court, finding that the testimony of Messrs. Bereza and Bosscher should be excluded. (Judges Smolenski and Kelly; Judge White dissenting.)
>
> **Affirmed** the lower court, finding that the testimony of Mr. Crane should be excluded. (Judges Smolenski, White and Kelly.)

(Copies of the trial court's opinion and the three opinions of the Court of Appeals are attached hereto as Exhibits A and B, respectively.)

For the reasons set forth below, North Star Steel requests that this Court grant this application for leave to appeal and reverse the decision of the Court of Appeals to the extent that

it reverses the trial court's decision.[1] The undisputed evidence demonstrates that plaintiff can not establish that North Star Steel was a proximate cause of plaintiff's decedent's death. In any event, plaintiff can not establish that North Star breached any duty it had to plaintiff's decedent.

The decision of the Court of Appeals is clearly erroneous and, unless reversed, will force the parties into a lengthy, expensive and unnecessary trial (MCR 7.302(B)(5)) and the key issues here involve legal principles of major significance to personal injury litigation. The resolution of these issues will affect the proofs necessary to establish proximate cause and breach of duty (MCR 7.302(B)(3)).

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1 Because the decisions of the Court of Appeals regarding the liability of the trucking company and the truck driver do not affect North Star, those issues will not be discussed herein. Nor will North Star address the admissibility of the testimony of plaintiff's purported experts.

QUESTIONS PRESENTED FOR REVIEW

Where plaintiff's decedent was hit by an object which plaintiff concedes can not be found and where plaintiff's expert could only identify it as -- at best -- an object "composed of corroded steel" with "some type of mineral material" and, therefore, where the object can not be linked to North Star Steel, did the trial court properly conclude that there was insufficient evidence to establish that any act of North Star Steel was a proximate cause of plaintiff's decedent's death?

Defendants say:	Yes.
Plaintiff says:	No.
The Trial Court said:	Yes.
Appeals Court Judge Kelly said:	Yes.
Appeals Court Judges Smolenski and White said:	No.

Assuming, arguendo, that the object came from North Star's property and assuming that it became wedged in the tires of co-defendant's truck, all as plaintiff claims, but where plaintiff can not identify where, when or how the object became wedged between the truck tires, and therefore can not show any improper act by North Star, should plaintiff's claim be dismissed for failure to establish a breach of duty by North Star?

Defendants say:	Yes.

Plaintiff says: No.

The Trial Court did not address this question.

Appeals Court Judge Kelly said: Yes.

Appeals Court Judges Smolenski and White did not address this question.

JURISDICTIONAL STATEMENT

North Star Steel seeks this Court's review of a decision of the Michigan Court of Appeals dated December 7, 2004. Jurisdiction in this Court is proper under MCR 7.301(A)(2).

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On October 13, 1999, plaintiff's decedent, Sheri Williams, was driving east-bound on Front Street in Monroe, just west of the North Star plant. Ms. Williams was in the inside (north) lane on her side of the road; a truck owned by co-defendant J. R. Phillips Trucking Company was heading west on Front Street, in the inside (south) lane on its side of the road. According to plaintiff, at approximately the time that the vehicles were passing each other, an unidentified projectile went through the front window of Ms. Williams' car with tremendous force. The projectile caused serious injury to Ms. Williams and she died shortly after the accident. Monroe Police Department Traffic Crash Report, Richards Deposition Exhibit 4.

Plaintiff's theory is that a piece of slag (a by-product of the steel making process) became lodged between the dual wheels of the J.R. Phillips truck. When the truck and Ms. Williams' car passed each other, the piece of slag came loose and was launched from the tires into the Williams vehicle. Plaintiff contends that the slag "had been negligently left in the roadway" at North Star Steel. Appellant's Brief at page 1.

After more than two years of litigation, including 32 depositions, **not one witness identified the projectile as "slag" nor has any witness explained where, when or how the unknown object got between the truck tires.** Plaintiff has not otherwise been able to link the object to North Star nor to any wrongful act or omission by North Star.

THE PARTIES

North Star Steel owned and operated a steel mill in Monroe, Michigan.[2] Co-Defendant International Mill Service ("IMS") had a contract with North Star to reclaim the slag and other byproducts of the steel making process. It removed the materials from the furnaces, reprocessed

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2 Defendant North Star Steel no longer owns the facility.

them and removed them from the plant. Co-Defendant J.R. Phillips Trucking was hired by IMS to haul the slag from the North Star plant. Co-Defendant Marc Sevigny drove the truck as an employee of J.R. Phillips.

NORTH STAR STEEL'S FACILITY

Attached hereto as Exhbit C is an aerial photograph of the North Star Steel facility in Monroe, as it existed at the time of the accident. (Ansel Deposition Exhibit 43.) Front Street runs from east to west just to the south of North Star's plant. Running parallel to Front Street is the long building where the steel is processed. The slag piles are to the left and above that building, just to the right of the river and adjacent to a wooded area in the southeast corner of the property. Trucks leave the slag piles and follow a road through the North Star plant, alongside the long steel mill building, to the exit onto Front Street. The accident occurred on Front Street, west of the plant, at the far right end of the photograph.

OVERVIEW

The circuit court properly dismissed plaintiff's complaint as to North Star Steel because plaintiff has admitted that she can not identify the object that hit plaintiff's decedent (Ms. Williams) and, therefore, plaintiff can not show that any action by North Star Steel was a proximate cause of the accident. In addition, plaintiff has not and can not show that North Star breached any duty it might have owed to plaintiff. Without the object, but accepting as true every proposition advanced by the plaintiff, she is unable to demonstrate that the object originated on North Star's property. Even assuming that it did originate on North Star's property, plaintiff can not explain how, when or where it got between the truck tires (if, in fact,

it did) nor can she demonstrate how long the object was in the tires, where it was at North Star, or how long the object sat on North Star's property.[3]

Based on all of the evidence developed in this case, it is entirely possible that the object that hit Ms. Williams was a broken part from another truck. It is entirely possible that the object fell off another truck and, moments later, the J.R. Phillips truck ran over it, lodging it between the tires. It is entirely possible that the J.R. Phillips truck picked up the object when it backed into the slag pile. Under any of these (and other) possible scenarios, North Star would not be liable. And, since plaintiff has admitted that she is unable to identify the object or where it (allegedly) entered the truck tires, the jury would be left to guess and speculate as to what happened that day. Therefore, the claim against North Star was properly dismissed.

The majority of the Court of Appeals panel concluded that plaintiff had "satisfied her burden of showing that the object was" slag from North Star's facility, but note the following (all quotations are from pages 3 and 4 of the Court of Appeals' opinion):

COURT OF APPEALS OPINION	**DISCUSSION**
"Corporal Brett C. Ansel, of the Michigan State Police [sic; actually from the Monroe Police Department], investigated the accident scene. Ansel identified what he believed was the object that struck Williams; the object was large and it was in the roadway. However, it was later determined that the object was composed of concrete, and not slag. Despite this, Ansel continued to believe that Williams was struck by slag."	In fact, Ansel testified that he never did find a piece of slag on the roadway or the surrounding area (Ansel Deposition, page 43) and though he continued to believe that the object that hit Ms. Williams was slag, his belief was not supported by any objective evidence. He found no slag, he had nothing tested and he sent nothing to the lab. (Ansel Deposition, page 101.)

[3] North Star's motion for summary disposition and the trial court's decision were based on plaintiff's inability to establish proximate cause. However, plaintiff, in her brief to the Court of Appeals, claims that she "presented evidence on" breach of duty. Appellant's brief at page 21. In fact, no such evidence was presented nor will plaintiff be able to present such evidence. Judge Kelly, in her dissenting opinion, discussed the issue of breach of duty (bottom of page 3); the other judges did not discuss breach of duty.

COURT OF APPEALS OPINION	DISCUSSION
"Plaintiff's expert, Scott Stoeffler, provided an affidavit in which he explained that he inspected Williams' car and took samples for analysis. Based on his inspection of the material he took from Williams' car, Stoeffler opined 'that more likely than not, the object that went through Ms. Williams' vehicle was composed primarily of carbon or alloy steel and was not a rock, stone or piece of concrete.' This opinion bolsters plaintiff's theory that the object was slag .. "	Note that Stoeffler, plaintiff's expert, never claimed the object was slag. Instead, he concluded in his first letter that the "object [was] composed predominantly of corroded [ie, rusted] steel" probably "a carbon or alloy steel, the presence of zinc indicating that it may have been galvanized." (May 31, 2001 letter to plaintiff's counsel, submitted to the Circuit Court in Exhibit CC to Plaintiff's Response to Defendant J.R. Phillips and Marc Sevigny's Motion for Summary Disposition, September 18, 2001). Upon further examination he added that "some type of mineral material may have actually been part of the object" which he still believed to be "composed of corroded steel" with "paint layers on some of the corroded steel particles." **Stoeffler never opined that the object that hit Ms. Williams was, or probably was, slag.**
"Moreover, gouge marks found on the pavement suggest that the object was lodged in the truck's tires at the time the truck left North Star's facility."	However, the gouge marks demonstrate -- at most -- that something was stuck in the truck's tires. They indicate nothing about what that object was or how it got there.
"Moreover, despite the fact that no slag was found, and that the object initially believed to be the object that struck Williams turned out to be concrete, there is evidence that suggests the object that struck Williams was, in fact, slag."	There is no such evidence and neither plaintiff nor the Court of Appeals has ever articulated what that evidence might be. Indeed, there is no evidence or expert opinion that would tend to show that the object was slag, instead of, for example, a rusted steel part from a truck.
"Viewing this evidence in a light most favorable to plaintiff, we conclude that plaintiff has presented sufficient evidence to indicate a 'reasonable likelihood of probability' that defendants' actions served as the proximate cause of Williams' death. Skinner, supra at 166."	The Court of Appeals failed to quote the very next sentence of the Skinner opinion: "The evidence need not negate all other possible causes, but **such evidence must exclude other reasonable hypotheses with a fair amount of certainty."** Emphasis added. Here, there is no evidence to exclude the possibility that Ms. Williams was hit with a piece of rusty steel that flew off a truck (not necessarily a J. R. Phillips truck). See Judge Kelly's dissenting opinion at pages 3-4.

The Court of Appeals erred; the trial court and Judge Kelly correctly decided this case. As is shown below, there is no evidence in the record that could show that any act of North Star was a proximate cause of Ms. Williams' injuries. Nor is there any evidence tending to show that North Star breached a duty.

THE OBJECT THAT HIT MS. WILLIAMS

The Fact Witnesses

There was one witness to the accident involved in this case. Mr. Spencer Maniaci was driving "100 or 200 feet" behind Ms. Williams' car. Maniaci Deposition, page 26. He did not see the object enter Ms. Williams' car, but he did see it exit the car. Mr. Maniaci is disinterested and the only eye witness; his testimony is worth quoting at length:

> Q. Mr. Maniaci, you were driving behind the Ford Escort some 100 or 200 feet?
>
> A. Yes.
>
> Q. And you saw the object come through the back window?
>
> A. Yes.
>
> * * * *
>
> Q. Now, you saw the object come out. It banged down on the trunk?
>
> A. Yeah, from what I -- it seemed like it did, yeah.
>
> Q. And then it rolled over toward the side of the road?
>
> A. Yes.
>
> * * * *
>
> Q. I'm going to show you what was previously identified as Deposition Exhibit Number 22. Let me show you this picture. Now, does that on the right side of the photograph, does that appear to be the object?

A. Yes.

Q. So this would be the side of the road where the object went?

A. Yes.

Q. Does that look like the object?

A. It could be. I don't know if that's what it was or not. I know it was big, similar to that. I can't say that's what it was, but it could be.

Q. Well, it's two years and you didn't have time to study on it?

A. Yes.

Q. Let's do it this way. It's in the location that would be consistent with what you remember?

A. Yes.

* * * *

Q. From what you can see, it's consistent with what you remember, right?

A. Yes.

* * * *

Q. And by looking or based on your recollection, can you recall what that object was made of?

A. I didn't look at it that closely. I couldn't tell you.

Q. Can you tell me what it wasn't made of?

A. No.

Q. I mean, it wasn't made of wood?

A. I didn't think so, no, no.

Q. Based on your memory, could it have been concrete?

* * * *

A. Yes.

Q. Could it have been a rock?

* * * *

A. Yeah, it could have been.

Q. I know we're sort of --

A. Yeah.

Q. -- plumbing the depths of your memory here, but do you recall what color it was?

A. Just it was a darker, it was a dark color. It wasn't -- I didn't -- that's all I can say, it was dark gray, something like that.

Q. Consistent with concrete?

* * * *

A. Darker, just somewhat. Yeah, it's similar, I guess.

Q. Similar to concrete?

A. Yes.

Maniaci Deposition, pages 26-32.

Maniaci is the only witness who testified to seeing the object leave Ms. Williams' car. He also testified that he pointed out the object to one of the investigating officers. Maniaci Deposition, pages 15 and 31. Significantly, however, the investigating officer testified quite clearly that he had not found any slag on the road:

Q. Did you ever find a piece of slag on that roadway or the surrounding area?

A. No.

Ansel Deposition, page 43; emphasis added. Moreover, the investigating officer, Monroe Police Corporal Ansel, testified that he did examine the very object identified by Mr. Maniaci as the object that came out of Ms. Williams' car -- and it was concrete!

> Q. Okay. The item we've marked as [deposition exhibit] Number 22, you believe that's a piece of slag?
>
> A. I believed, at the time, that -- I thought it was a piece of slag.
>
> Q. Did you later learn that it wasn't?
>
> A. I believe that ended up being a piece of concrete.

Ansel Deposition, page 42.

The foregoing testimony, of the only witness to the accident and of the investigating officer, would seem to be enough to demonstrate that the object that hit Ms. Williams was not slag. The question, then, would be whether there is any conflicting testimony.

Lieutenant Richards, of the Monroe Police Department, was also on the scene the day of the accident. He, too, testified that no slag was found on the road.

> Q. . . . But did anyone find any slag on the roadway at all?
>
> A. No.
>
> Q. Has anyone ever reported to you or, to your knowledge, to your department that anyone, from the time the accident took place until that scene was clear, removed a piece of slag or any other item from that roadway, other than a police officer?
>
> A. No.

Richards Deposition, page 35. Perhaps more significantly, Lieutenant Richards testified to a scraped piece of concrete that might have caused the accident.

Q. Did you find any objects upon the roadway or near it that had any fresh scrape marks to indicate maybe they had just been damaged and might be part of the story of this accident?

A. Yes.

Q. Okay, And what was that material?

A. That was the piece of **concrete** I spoke of earlier.

Richards Deposition, pages 20-21; emphasis added.

Ronald Cutter was sitting in his welding truck near the scene of the accident when he heard a noise and saw Ms. Williams' car veer across the road. He saw the car and Ms. Williams right after the accident, but he did not see the event itself.

Q. . . . you have no personal knowledge of what may have hit the white car, correct?

A. No, I really don't know what hit it.

Cutter Deposition, pages 45-46.

No other witness (except the J.R. Phillips truck drivers) was at the scene on the day of the accident.[4] No other witness had first hand knowledge of the accident. No witness was able to identify the projectile as slag.

The Expert Witnesses

There have been a number of experts involved in this case in one way or another. Larry Richardson was the first. At the time of the accident he was a sergeant with the Michigan State Police, specializing in accident reconstruction. Richardson Deposition, page 5. Monroe Police Corporal Ansel asked Sergeant Richardson to assist him in the investigation and Richardson went to the site several days after the accident.

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[4] Significantly, no employee of North Star Steel was near the accident scene until long after the accident.

All of the information available to Richardson was provided to him by Corporal Ansel. Richardson Deposition, page 46. Clearly, Richardson could not know if the object was slag, since Ansel did not know if it was slag. Richardson so testified:

> Q: Are you aware of any evidence that a piece of slag was involved in this accident at all?
>
> A: We never found the object, that I know of, so I can't say one way or another.

Richardson Deposition, page 36. No other expert had the opportunity to obtain first hand information regarding the object that his Ms. Williams. Bereza Deposition, page 126; Crane Deposition, page 54; Bosscher Deposition, page 64; Brach Deposition, pages 23-24.

Scott Stoeffler is the last of plaintiff's expert witnesses. He was not deposed due to disagreements among counsel. In 2001, Mr. Stoeffler collected fragments of debris from Ms. Williams' car and analyzed that debris with an electron microscope. He supplied a report of his findings dated May 31, 2001. Then Stoeffler collected other evidence and analyzed that evidence with an electron microscope in February, 2002. Plaintiff supplied a report from Stoeffler, describing Stoeffler's conclusions following his 2002 examination of the evidence (although that report was not submitted until after the trial court ruled on North Star's motion.) Plaintiff also supplied Stoeffler's affidavit in September, 2001.

Stoeffler's 2001 report concludes that

> [T]he windshield was penetrated at the lower left corner by an object composed predominantly of corroded steel, which struck the driver in the face, . . .

May 31, 2001 letter, Stoeffler to Matusz, page 5. In his 2002 report, Stoeffler modified slightly his earlier conclusion to note that the object, although certainly made of "corroded steel," may have had "mineral material" as part of it. October 17, 2002 letter, Stoeffler to Matusz, page 10.

Nowhere in Stoeffler's reports or affidavit does he identify the object as slag. Stoeffler says the object was made primarily of corroded steel -- i.e., rusty steel.

THE GOUGE MARKS

Plaintiff claims that the gouge marks on Front Street are the bread crumbs that lead from the accident scene right back to North Star. In fact, the testimony does not support plaintiff's assertion or the Court of Appeals' conclusion. Eleven deponents testified about the gouge marks; their testimony is inconsistent but suggests the marks started on Front Street, not on North Star's property.

Attached hereto as Exhibit C is a copy of an aerial photo of the North Star plant and the surrounding area. Ansel Deposition Exhibit 43. According to plaintiff's theory, the J. R Phillips truck pulled out of the North Star facility, turned left, crossing over the two eastbound lanes, and proceeded west in the inside, westbound lane until the point of the accident. According to plaintiff, the gouge marks began on the North Star property and continued to the point of the accident. But consider the following:

Corporal Ansel is the accident investigation officer for the Monroe Police Department. Ansel Deposition, page 8; Richards Deposition, pages 59-60. After Lieutenant Richards pointed out the so-called gouge marks, Ansel measured them and circled each one with orange paint. Ansel Deposition, pages 16, 20; Richards Deposition, pages 11, 38. He was not sure whether there were any gouge marks in the eastbound lane. He testified that he believed that he photographed every mark, Ansel Deposition, page 20, but was unable to find a photograph showing any marks in the eastbound lanes.[5] Ansel Deposition, page 22. **Ansel was very sure,**

[5] As the truck left the North Star plant, it had to cross the eastbound lanes to get to the westbound lanes. The absence of any gouge marks in the eastbound lanes casts further doubt on the argument that the gouge marks originated on North Star's property.

however, that there were no marks on the North Star property. Ansel Deposition, page 67. Ansel was the one who painted the circles around the gouge marks.

In contrast, David Suttles, a North Star employee, is the only person (of the eleven who testified) who testified to seeing the painted circles on North Star's property. Suttles Deposition, page 62.

Assuming that the gouge marks began on the North Star property, they prove nothing about what caused those marks. The gouge marks would show - at best - that an object was caught in a truck's tires at the time it left the North Star property. The gouge marks tell us nothing about what the object was, when it got caught in the tires, how it got into the tires or how long it was caught in the tires. As noted below, it is entirely possible that the object that caused the gouges was a broken part from another vehicle, picked up only moments after it fell off the other vehicle. The gouge marks prove nothing about proximate cause or breach of duty.

THE LIFT AXLES

Plaintiff alleges that the object was lodged in either the fourth or eighth axle of the truck, though plaintiff is not sure which. Appellant's Brief at page 4. It is significant that plaintiff picks those two axles because they are the two "lift" axles on the truck. Sevigny Deposition, page 69. The driver is able to raise and lower those axles from the cab and he does so routinely.

At his deposition, Mr. Sevigny, the truck driver, explained that the lift axles are raised when he is maneuvering through turns and curves. Once the truck is on a straight road, he lowers the lift axles. Sevigny Deposition, page 86. Specifically, at North Star, Sevigny testified that he had the axles lowered when his truck was being loaded at the IMS yard. The axles were down when he backed up to the slag pile to dump part of his load. The axles were still down when he had the truck weighed. Then he raised the axles and drove through the North Star plant,

turned left onto Front Street, into the westbound lane, and then lowered his lift axles when he straightened out. Sevigny Deposition, pages 15; 31-32; 86-87; 92-94.

Sevigny's description of his use of the lift axles is consistent with the testimony of the other truck driver and of plaintiff's purported experts. See: Rioux Deposition, pages 102-105; 110-112; Bosscher Deposition, page 32; and Crane Deposition, pages 24-25. If something had been stuck between the tires of the lift axles, it could not have gotten there on the drive through the North Star plant - those axles were up when the truck was negotiating the roadway in the plant. Nor could anything caught in those tires cause gouge marks on North Star's property.

THE CONDITION OF THE PREMISES

Plaintiff claims, directly or by repeated implication, that the roadways at North Star Steel are littered with debris, making it easy to understand how something might have become lodged in the truck tires. In fact, the record does not support plaintiff's position.

Sixteen deponents were asked about the condition of the roads at North Star; virtually all described them as clean. Perhaps the most credible witness on this issue is the Monroe Police Officer who investigated the accident, Corporal Ansel.

> Q: Well, let me ask you this. When you went back to the facility, did you see - - to the IMS facility, all along the roadway, did you see five- or six-inch pieces of slag on the roadway anywhere?
>
> A: No. The roadway was fairly clean.
>
> Q: And how about the area where the slag piles were?
>
> A: Well, at the bottom of the piles, you know, there were some pieces protruding or not exactly with the piles. But it appeared to be fairly clean.

Ansel Deposition, page 84. See also: James Heikkila Deposition, pages 26-27; Roper Deposition, page 20; Colombe Deposition, page 35; Hahey Deposition, pages 31-32; Jonasen

Deposition, pages 21-22; Kuehnlein Deposition, pages 23-25; Larner Deposition, pages 16-17; Liford Deposition, pages 9-13; Meyers Deposition, pages 13-14; D. Sterns Deposition, pages 25-27; R. Sterns Deposition, pages 21-22; Suttles Deposition, pages 16-17; and Garbig Deposition, pages 15-16.

Dean Rioux, the driver of the truck in front of Sevigny on the day of the accident, is the only witness who characterized the roads at North Star as anything but clean and well maintained. His description was brief: "not good." Rioux Deposition, pages 106-107.

The testimony of Mark Sevigny, the truck driver whose vehicle is implicated in the accident, was similar to the testimony of Corporal Ansel. There was "a lot of stuff" lying around the piles and "some on the roadway" around those piles. Sevigny Deposition, pages 28-29; 84-85. However, on the "long roadway that's running east to west" he could not remember seeing any debris. Sevigny Deposition, page 85.

ARGUMENT

INTRODUCTION

In order to hold North Star liable, plaintiff must demonstrate, at the least, that North Star breached a duty it had to the plaintiff and that the breach of duty was a proximate cause of the injury to Ms. Williams. This plaintiff can not do because plaintiff can not identify the object that hit Ms. Williams. Plaintiff freely admits this. Appellant's Brief at page 38. Without the object, it is impossible for plaintiff to prove that North Star was negligent: plaintiff can not show proximate cause and plaintiff can not prove the breach of a duty.

Any of the following could have occurred and **there is no evidence that makes one event more likely than another:**

1. On his way into the facility, on Front Street or elsewhere, Sevigny ran over a piece of rusty steel, and it stayed in his tires until he got back onto Front Street and picked up speed.

2. On his way out of North Star, Sevigny ran over a broken part from another truck that had passed that way only moments before.

3. Another truck, leaving North Star a few moments before Sevigny, dropped a piece of slag from his load. Moments later, Sevigny drove over it and wedged it in his tires.

4. After Sevigny drove out of North Star, onto Front Street, he drove over a piece of steel, which wedged in his tires.

5. After Sevigny drove onto Front Street, he drove over a broken part from another truck, which wedged in his tires.

6. When Sevigny backed up to dump some of his load, he picked up an object (slag or scrap) between his tires. That would not implicate negligence by North Star - slag is supposed to be in those piles.

As will be shown below and as the Court of Appeals acknowledged, the fact finder must have evidence upon which to base a conclusion. Here, there is no such evidence to rule out any of the above scenarios, only conjecture. For that reason, the trial court properly dismissed plaintiff's claim against North Star. Two of the three Court of Appeals judges erred in reversing that decision.

PLAINTIFF MUST OFFER EVIDENCE THAT A BREACH OF DUTY BY NORTH STAR WAS THE PROXIMATE CAUSE OF MS. WILLIAMS' INJURIES

The elements of negligence are well known. Plaintiff must establish

> [1] that the defendant owed a legal duty to the plaintiff, [2] that the defendant breached or violated the legal duty, [3] that the plaintiff suffered damages, and [4] that the breach was a proximate cause of the damages suffered.

Schultz v Consumers Power Company, 443 Mich 445, 449; 506 NW2d 175 (1993), rehrg den, 444 Mich 1202 (1993). Here, plaintiff can not establish at least two of the four elements of negligence as to North Star: proximate cause and breach of duty. For that reason, the trial court properly dismissed plaintiff's claim against North Star:

> Liability does not attach unless an actor's negligent conduct is a proximate or legal cause of the harm suffered.

Brisboy v Fibreboard Corporation, 429 Mich 540, 547; 418 NW2d 650 (1988).

PLAINTIFF HAS THE BURDEN OF COMING FORWARD WITH ADMISSIBLE EVIDENCE

In order to avoid dismissal of her case by summary disposition, the plaintiff here was obligated to come forward with specific evidence tending to demonstrate that the object which hit Ms. Williams was slag that originated on North Star's property, **and** that the slag got to Ms. Williams through some act of negligence by North Star.

> Once a party is challenged as to the existence of the facts upon which he purports to build his case, the sum and substance of the summary judgment proceeding is that general allegations and notice pleading are not enough. Matters upon information and belief and alleged common knowledge are not enough. *That party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. If he fails, the motion for summary judgment is properly granted.*

Skinner v Square D Company, 445 Mich 153, 160-161; 516 NW2d 475 (1994), rehrg den, 445 Mich 1233 (1994); italics in original. Moreover, the evidence to be offered must be admissible. MCR 2.116(G)(6).

Plaintiff has not and can not meet her burden.

PLAINTIFF MUST PRESENT SUBSTANTIAL EVIDENCE THAT NORTH STAR'S ACTIONS WERE A PROXIMATE CAUSE OF THE INJURY

The key case on proximate cause in our context is Skinner, supra.

> We have previously explained that proving proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause also known as "proximate cause." *Moning v Alfono, 400 Mich 425, 437; 254 NW2d 759 (1977).*
>
> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. Prosser & Keeton, Torts (5th ed), § 41, p. 266. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. Moning at 439. See also *Reinhart Co v Winiemko, 444 Mich 579, 586, n 13; 513 NW2d 773 (1994).* A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue. We find that the plaintiffs here were unsuccessful in showing a genuine issue of factual causation. Accordingly, we need not and do not address legal cause of "proximate cause" in this case.

445 Mich at 163.

This Court held that the plaintiff in Skinner failed to offer sufficient evidence that "but for" the defendant's actions, he would not have been electrocuted.

> We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. As *Kaminski* explains, at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.
>
> * * * * *
>
> The mere possibility that a defendant's negligence may have been the cause, either theoretical or conjectural, of an accident is not sufficient to establish a causal link between the two. *Jordan v Whiting Corp, 396 Mich 145, 151; 240 NW2d 468 (1976).*
>
> There must be substantial evidence which forms a reasonable basis for the inference of negligence. There must be more than a mere possibility that unreasonable conduct of the defendant caused the

> injury. We cannot permit the jury to guess . . . *Daigneau v Young, 349 Mich 632, 636; 85 NW2d 88 (1957)* (citations omitted).
>
> Something more should be offered the jury than a situation which, by ingenious interpretation, suggests the mere possibility of defendant's negligence being the cause of injury. [Howe at 584.]

Skinner, at 164-166.

This Court recently underlined its holding in Skinner. In Craig v Oakwood Hospital, 471 Mich 67; 684 NW2d 296 (July 23, 2004), the issue was whether the actions of a physician were the cause of plaintiff's injuries.

> It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he "set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." A valid theory of causation, therefore, must be based on facts in evidence. And while "[t]he evidence need not negate all other possible causes," this Court has consistently required that the evidence "exclude other reasonable hypotheses with a fair amount of certainty."

471 Mich at 87-88. The majority in Craig found that the plaintiff failed to supply evidence of causation:

> Here, any causal connection between plaintiff's cerebral palsy and the events described by Dr. Gabriel had to be supplied *ex nihilo* by the jury.

471 Mich at 93.

Here, too, there are no facts to establish that North Star was the proximate cause of Ms. Williams' injuries.

PLAINTIFF CAN NOT ESTABLISH THAT ANY ACT OF NORTH STAR WAS A PROXIMATE CAUSE OF MS. WILLIAMS' INJURIES

Plaintiff's best case is that the object that hit Ms. Williams "was made up of metal." Appellant's Brief at page 21. That is hardly a distinctive description. As Judge LaVoy stated in his opinion granting North Star's motion for summary disposition, plaintiff's claim is that the object was "comprised of ubiquitous materials." Trial Court Opinion at page 5. Thus, there is no way to tie the object (which was never found) to North Star Steel. Summary disposition was proper.

A 1993 decision of the Michigan Court of Appeals is precisely on point and was the focus of the discussion below. **The majority of the Court of Appeals, however, did not even mention the case.** Judge Kelly, on the other hand, discussed it at length (at pages 3 and 4 of her opinion). In Moody v Chevron Chemical Company, 201 Mich App 232; 505 NW2d 900 (1993), app den, 447 Mich 979 (1994), plaintiff's decedent was killed when he had an allergic reaction to a bee sting. The decedent was employed by a landscaping company which was working at the property of one of the defendants, Leroy Miller. While the decedent was working, Mr. Miller sprayed a nest of bees on his property. The pesticide used by Miller was manufactured by the other defendant, Chevron.

Shortly after the spraying, plaintiff's decedent was stung -- allegedly by a bee that Miller had sprayed with the pesticide. The decedent died ten days later from an allergic reaction to the bee sting. Plaintiff claimed that Miller was negligent, for stirring up the bees but not finishing them off, and that Chevron was negligent for failing to warn purchasers that a less than fatal dose of insecticide can cause the bees to engage in "unprovoked stinging." Both claims assume that

the decedent was stung by a bee that Miller had sprayed, as opposed to a bee that was just passing by.

Plaintiff's claims were dismissed on summary judgment. The plaintiff had not recovered the bee that stung his decedent and could not prove that it was a bee from the nest sprayed by defendant.

> [T]he trial court found that, as a matter of law, plaintiff could not prove proximate causation. That is, because the stinging bee was not recovered, plaintiff could not prove that the bee that stung his son came from the nest that was sprayed, that it came in contact with the pesticide, or that its behavior was caused by exposure to the pesticide. Therefore, the causal sequence of events posited by plaintiff, although conceivably true, was not based on any evidence and was instead wholly speculative.

201 Mich App at 238.

The Moody case is on all fours with this case. Substitute the word "object" for "bee," and the Court of Appeals' opinion in Moody can be applied directly to this case. **Nevertheless, the Court of Appeals' majority did not even mention the Moody case.** Plaintiff here can not show that the projectile that hit her decedent was slag or came from the North Star property. "Therefore, the causal sequence of events posited by plaintiff, although conceivably true, [is] not based on any evidence and [is] instead wholly speculative. Moody at page 238.

Numerous cases address the question of proof necessary to show proximate cause. **The majority of the Court of Appeals did not discuss any of these cases.** A 1977 decision of the Michigan Court of Appeals sounds eerily like our case. In Schram v Chambers, 79 Mich App 248; 261 NW2d 277 (1977), the plaintiff alleged that she fell on "a piece of sheet-metal-like material in her backyard." 79 Mich App at 250. She claimed that the piece of sheet metal had been part of her neighbor's backyard shed which was blown down in a storm. Ms. Schram, like

the plaintiff in our case, had been unable to locate the piece of sheet metal. The case was properly dismissed on summary judgment:

> Both parties agree that the Chambers owned a shed which was damaged in a wind storm a few days prior to plaintiff's fall. . . . Plaintiff does not assert any personal knowledge of where the piece of material upon which she slipped came from. A fair reading of the LaRose deposition does not support an inference that the piece of material came from defendants' shed. Plaintiff has been unable to produce the piece of material upon which she slipped.
>
> In our view plaintiff has not proffered any admissible evidence which puts causation into dispute, nothing from which a reasonable inference could be drawn supporting plaintiff's claim.

79 Mich App at 253.

Just as in Schram, the plaintiff here "has been unable to produce the piece of material" which hit Ms. Williams. And, just as in Schram, there is no "admissible evidence which puts causation into dispute." The lower court properly dismissed plaintiff's complaint as to North Star.

The Court of Appeals addressed a similar situation in an unpublished opinion released on July 8, 2003: Laurie MacDonald v Heights Marina, Court of Appeals (Docket No. 235622). (Pursuant to MCR 7.215(C)(1), a copy of MacDonald is attached hereto as Exhibit D.)

Plaintiff's husband, James MacDonald was riding his snowmobile on frozen Houghton Lake when he hit an "obstacle" and he and the snowmobile became airborne. He crashed into defendant's pier and was killed.

Plaintiff argued that her husband ran into snow-covered concrete blocks which defendant had negligently left on the lake. However, plaintiff's own evidence also showed cracks in the ice which could have caused the accident. Plaintiff had no evidence as to what Mr. MacDonald hit.

> In this case, plaintiffs presented photographs that depicted both ice cracks and concrete blocks, but no evidence that the snowmobiles

> hit a concrete block and not an ice crack. . . . [A] reasonable juror would be forced to guess whether the snowmobiles hit the crack or a block.

The Court of Appeals upheld the lower court's grant of summary disposition.

In another unpublished opinion dated February 3, 2004, the Court of Appeals also discussed proximate cause. Madgwick v Huey, Court of Appeals (Docket No. 243060) (attached as Exhibit E). Plaintiff's decedent (McAskin) was found fatally injured at the bottom of the basement stairs in defendant's house. The two had been out the previous evening and after several drinks, McAskin had fallen asleep in the car. Defendant carried her into the house and left her asleep on the kitchen floor, near the basement stairs. The next morning he found McAskin on the basement floor.

The trial court granted defendant's motion for summary disposition and the Court of Appeals affirmed:

> . . . plaintiff must prove defendant's actions were the proximate cause of McAskin's injury. The mere possibility of causation is not enough, and the causal sequence of events posited by plaintiff, although conceivably true, must be based on evidence and cannot be wholly speculative.

Opinion at page 16.

In Stefan v White, 76 Mich App 654; 257 NW2d 206 (1977), Mrs. Stefan fell and was injured. She was unable to say "how or why she fell." 76 Mich App at 656. Mr. Stefan submitted an affidavit identifying a metal strip "extruding [sic] from about 1/8 to 1/4 of an inch." 76 Mich App at 658. However, he did not see his wife fall and only surmised that she had tripped on the metal strip. The husband's affidavit was not enough to avoid summary judgment.

> The mere occurrence of plaintiff's fall is not enough to raise an inference of negligence on the part of defendant. As has been noted, plaintiff's husband did not see the fall. His affidavit points to one possible cause - - the metal strip - - but it presents no evidence linking that strip to the fall. Only conjecture can make

> this the causal element to the exclusion of all others. Such speculation or conjecture is insufficient to raise a genuine issue of material fact.

76 Mich App at 661.

In Meli v General Motors Corporation, 37 Mich App 514; 195 NW2d 85 (1972), Mr. Meli was injured when the accelerator on his 1965 Oldsmobile "stuck to the floor." Testimony revealed that the "accelerator spring was knocked off rather than broken and there was no evidence of mechanical failure." 37 Mich App at 516. However, plaintiff could offer no evidence as to whether the spring became disconnected due to a manufacturing defect or due to some other cause. The Court of Appeals upheld the directed verdict in favor of the defendant.

> In the instant case there was no evidence from which the trier of fact could properly deduce that the accelerator spring became disconnected as a result of a defect in the manufacture. We are dealing here with a part which is open and could have been disconnected while the car was being serviced or through any number of other ways, each as plausible as plaintiffs' contention that it was caused by a defect in the manufacture.
>
> * * *
>
> . . . Therefore, since there was no evidence to remove the plaintiffs' theory from the realm of conjecture, the trial court properly directed the verdict in defendant's favor.

37 Mich App at 519 - 520.

All of these cases have one point in common: there must be evidence from which the trier of fact can determine without guessing what caused the plaintiff's accident. Here there is no such evidence and there can be no such evidence. Plaintiff claims that the object that hit Ms. Williams disappeared and all of her expert's science only allows him to conclude that the object was composed of "corroded steel."

The object could have originated in many places. It could be anything containing a significant amount of rusty steel. There is no way to prove it was slag and, even if it were slag, there is no way to prove that it was picked up on one of the roads in the North Star property (as opposed to, for example, the slag pile itself) and even if it was picked up on the road, there is no way to prove how long it had been on the road. Because plaintiff can not establish proximate cause, the lower court properly dismissed plaintiff's complaint as to North Star Steel. **The Court of Appeals did not even discuss the cases cited herein or the analytical issues involved.**

PLAINTIFF CAN NOT ESTABLISH THAT NORTH STAR BREACHED ANY DUTY

Plaintiff in a negligence case must also establish that the defendant had a duty to plaintiff and that defendant breached that duty. Plaintiff, here, claims that North Star had a "duty to keep the roadways within the NSS/IMS property free from debris. . . [and] routinely failed in this duty." Appellant's Brief at page 20. Saying it, however, does not make it so.

Assuming, for the sake of discussion only, that Ms. Williams was struck by a piece of slag lodged in the truck tires and that the slag originated on the North Star property, plaintiff must still demonstrate that the object got to Ms. Williams due to a breach of duty by North Star. This plaintiff can not demonstrate, because plaintiff can not show how or when or where the truck picked up the object. **The Court of Appeals' majority did not even discuss this issue.**

If a piece of slag fell off a truck directly in front of Mr. Sevigny's truck and he ran over it a moment later, North Star is not liable. It has no obligation to follow every vehicle around on its property. Plaintiff must show that the object that hit Ms. Williams was lying on the roadway long enough for North Star to have notice and an opportunity to cure.

> Knowledge is fundamental to liability for negligence. The very concept of negligence presupposes that the actor either does foresee an unreasonable risk of injury, or could foresee it if he conducted himself as a reasonably prudent man.

American Airlines, Inc v Shell Oil Company, Inc, 355 Mich 151, 162; 94 NW2d 214 (1959).

This principle has been applied repeatedly. For example, in Derbabian v Mariner's Pointe Associates Limited Partnership, 249 Mich App 695; 644 NW2d 779 (2002), the plaintiff slipped on ice in a shopping center parking lot. Plaintiff's case was dismissed, however, because she could not show that

> the condition of the parking lot was caused by defendant's active negligence or the condition "had existed a sufficient length of time that [defendant] should have had knowledge of it."

249 Mich App at 706.

A decision from the Sixth Circuit blends the issues of proximate cause and breach of duty and once again shows why dismissal, here, is proper. In O'Mara v Pennsylvania R Co, 95 F2d 762 (CA6, 1938) the plaintiff, a railway employee, jumped off a baggage cart onto the railway platform and "in doing so his foot struck a bolt lying there, and he was injured." 95 F2d at 762. The bolt was "of a type used by the railroad" and was large, as bolts go: "one and a half inches in diameter, eight inches long, with a square head, weighing approximately half a pound." 95 F2d at 762-763.

Mr. O'Mara sued the railroad for not providing a safe working place. However,

> No one knew how the bolt came to be upon the platform. The inference is equally tenable that it came there through the agency of strangers as that it came there through the agency of the railroad, and, as we have frequently held, to submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice, it is not substantial proof of negligence.

95 F2d at 763. The complaint was properly dismissed.

In Larry Lee Hampton v Waste Management of Michigan, Inc, 236 Mich App 598; 601 NW2d 172 (1999) the plaintiff was working on a ladder adjacent to a market. Apparently some oily substance seeped out of a nearby dumpster which caused the ladder to slip and the plaintiff to fall. Both the dumpster owner and the market were dismissed because plaintiff could not establish a breach of duty by either defendant.

> Nevertheless, even if we presume that the substance did so leak from the dumpster, there is no indication that Northwest Market or any of its employees had any knowledge of material ever leaking from the dumpster in the past. Thus, there was no evidence presented to reasonably support a finding that either Northwest Market or any of its employees should have anticipated that any material placed in the dumpster would leak from it. . . . [T]here was no evidence of an unreasonable act or omission by Northwest Market or any of its employees that was a proximate cause of Hampton's accident or that Northwest Market had actual or constructive notice of the alleged leak from the dumpster.

236 Mich App at 605-606.

Similarly, in Whitmore v Sears, Roebuck & Company, 89 Mich App 3; 279 NW2d 318 (1979) the plaintiff's case was dismissed for failure to show breach of a duty. The plaintiff slipped on a liquid substance in the Sears parking lot.

> Thus, in order to recover from Sears, plaintiff must show either that an employee of Sears caused the unsafe condition or that a servant of Sears knew or should have known that the unsafe condition existed. Notice may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful storekeeper to discover it.

89 Mich App at 8.

Just as in the cases summarized above, the plaintiff here can not show any breach of duty by North Star. There is no showing that there was an object in the road, that North Star knew that there was an object in the road and failed to remove it, nor is there any showing that the

object was in the road for any length of time. In simple terms, plaintiff can not show that North Star did anything wrong.

The majority of the Court of Appeals failed even to discuss the breach of duty issue. It ignored it. Judge Kelly, however, did discuss the point (at pages 3-4 of her opinion):

> At most, the evidence establishes that an object of unknown origin was picked up on the apron of the driveway leading to Front Street where the fresh gouge marks started. There is no evidence demonstrating where, when, or how the unidentified object came to be there. It could have been dropped by Sevigny's co-worker Dean Rioux's truck which, also carrying a truckload of slag, immediately preceded Sevigny onto Front Street. It could also have come from myriad other sources. The evidence demonstrates that Front Street is located in an industrial area heavily traveled by trucks and other industrial traffic.

Plaintiff has offered absolutely no evidence to show a breach of duty by North Star. This issue was raised in the Court of Appeals but not addressed by the majority in its opinion.

CONCLUSION

The Court of Appeals majority erred. It failed to discuss the key issues and it failed properly to analyze the evidence in light of those issues. As a result of its error, three defendants will be put to the expense of a lengthy trial.

North Star requests this Court grant leave to appeal and, thereafter, reverse the decision of the Court of Appeals.

Respectfully submitted,

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